Kirubakaran a/l T Karthigasu (suing as president and general officer for the management committee of Sri Subramaniya Swami Temple, Kajang, (Committee of Kuil Sri Subramaniya Swami), Jalan Reko, 43000 Kajang, Selangor Darul Ehsan v Setiausaha Negeri Selangor & Ors and another appeal

HIGH COURT (SHAH ALAM) — APPLICATION FOR JUDICIAL REVIEW NOS BA-25–28–06 OF 2017 AND BA-25–41–07 OF 2017
VAZEER ALAM J
30 NOVEMBER 2018

Administrative Law — Judicial review — Application for — Applicant applied for judicial review against decisions of state authority — Whether amendment of proclamation for use of land valid — Whether decision for rejecting application for extension of planning permission valid — Whether amendment to gazette notification allowed — Whether Selangor State Government consented to application for planning permission — Whether judicial review application improper and amounted to abuse of court's process

The underlying proceedings were pertaining to two judicial review applications concerning a graveyard or crematorium situated on Lot 4539, Mukim of Kajang, District of Ulu Langat, Selangor. The applicant in both judicial review applications was suing as Jawatankuasa Kuil Sri Subramaniya Swami Kajang, Jalan Reko Kajang ('the society'). The society managed a temple known as Kuil Sri Subramaniya Swami, Kajang, Jalan Reko, 43000 Kajang, Selangor ('the temple') built on part of Lot 4539 and maintained a Hindu graveyard and crematorium on parts of the said land. Both judicial reviews were related to two matters namely: (a) the proclamation of the use of Lot 4539 originally as a reserve for the purpose of a place for the internment and cremation of the dead of Hindu community of Kajang which was amended by the state authority to for a place for the internment of non-Muslims and then further amended to Hindu cemetery; and (b) the rejection of the society's application for extension of planning permission for the development of Lot 4539 by Majlis Perbandaran Kajang ('MPKj'). Two individuals were named as trustees on behalf of the Hindu community of Kajang appointed to maintain the reserve in Lot 4539. The trustees had passed away some years ago and the applicant did not have any further information about them or if any other individuals were appointed as successor to the trustees. The society took over the management of the temple which continued to be used as a Hindu burial and cremation ground. There was no evidence showing that the society was duly appointed successors to the trustees with the approval of the state authority. In the judicial review applications, the applicant argued that once

the *gazette* notification was made pursuant to s 62 of the National Land Code ('the Code'), it could not be amended as there was no power under the NLC to amend such notification. The applicant also contended that the letter from Timbalan Pengarah, Seksyen Pihak Berkuasa Tempatan, Unit Perancang Ekonomi, Pejabat Setiausaha Kerajaan Negeri amounted to consent from Selangor State Government for planning permission. Learned counsel for MPKj argued that the present applications for judicial review were improper and an abuse of court's process.

Held, dismissing both the judicial review applications with costs:

(1) The word 'may' in s 62(1) of the Code referred to the discretionary power vested in the state authority to effect reservation of state land, which if so exercised was only legally effective if duly notified in the government gazette. The fact remained that reserve land belonged to the state authority which was the Selangor State government. Lot 4539 though proclaimed as reserve land for the public purpose of the internment of non-Muslims, remained state land under the control of the Selangor State government. The society's role was merely to maintain Lot 4359 for its intended public purpose. The role of the society was akin to a licensee or lawful user of the state land (see paras 24).

(2) The court was satisfied that there was sufficient evidence showing that the *gazette* notification No 1511 contained a mistake when it stated the public purpose on the reserve on Lot 4539 as 'a place for the internment of non-Muslims' instead of 'Hindu cemetery' as was approved by the Selangor Menteri Besar. It could not be the intention of Parliament to not allow any room to correct the error in the *gazette* notification. Any genuine errors made in the *gazette* notification that gave effect to such reservation must be correctable by the issuance of another *gazette* notification as it would be reasonably necessary to enable the state authority to exercise the power effectively (see paras 25–26).

(3) The actual intention of the state authority in approving the reserve, such as the Selangor MB's approval in this case, is equally important. It is abundantly clear that the intention of the state authority in making Lot 4539 a reserve for public purpose was to make it available for a 'Hindu cemetery' and not a 'place of internment for non-Muslims'. The court found that the respondents have acted reasonably and well within their lawful powers in making the corrigendum (see para 27).

(4) It was very clear that pursuant to s 24(3), any extension of a planning permission was at the discretion of the local planning authority. The local planning authority might impose such conditions on the planning permission as it thought fit or varied the conditions originally imposed. It could not be said that an applicant had the legitimate expectation that an application for extension of a planning permission would be

unconditionally approved, as was contended by the applicant. Lot 4539 was a reserved state land and the entire property in all state land shall vested solely in the state authority. The powers of the state government in respect of state lands dealt with only by an official of the state government having been given the powers to do so by delegation. At the time when the application for planning permission was made by the society, it was the Selangor Menteri Besar who had delegated authority to give the written consent. There was no evidence to show that the Selangor Menteri Besar or the State Secretary, as the officer having control, had given their written consent for the society to carry out the project on Lot 4539 and to apply for planning permission. The letter issued was merely to convey the decision of the Jawatankuasa Hal Ehwal Selain Islam Negeri in respect of the society's application for planning permission and not to convey the state authority's consent as the land owner (see paras 33, 39 & 41).

(5) It was a valid reason for the rejection of application for planning permission as it was contrary to the public purpose of the reserved land. In any event, there was nothing in the National Land Code that precluded the state authority from revisiting an earlier decision as regards the declaration of public purpose of state reserve and making a fresh decision. MPKj had properly exercised its discretion in making the decision challenged therein. When the society made the application for planning permission, Lot 4539's reserve status did not give any legal standing to the society to make the application, other than as occupier of the land (see paras 43–44).

(6) Judicial review was always at the discretion of the court, but where there was alternative remedy available, it would be exercised only in very exceptional circumstances. When there was an alternate statutory remedy available, then ordinarily the courts would decline judicial review. The exception to that general approach was when the applicant was able to show clear excess or abuse of power or breach of the rules of natural justice, in which case the courts would be ready to grant judicial review. The court found that there are no exceptional circumstances showing the respondents to have acted in excess of jurisdiction or having abused their power or having breached the rules of natural justice in coming to the decisions which were the subject matter of the judicial review. The respondent had not committed any illegality nor were the decisions irrational in the sense of *Wednesbury* unreasonableness. The respondents had quite correctly applied the law to the facts in making the impugned decisions. The respondents had considered all matters relevant to the issue and had not taken into consideration irrelevant matters. The decisions did not suffer from the infirmities of illegality, irrationality, unreasonableness or procedural impropriety (see paras 48–49 & 53).

[Bahasa Malaysia summary

Pada asasnya prosiding ini adalah berkenaan dengan dua permohonan semakan kehakiman mengenai perkuburan atau krematorium yang terletak di Lot 4539, Mukim Kajang, Daerah Ulu Langat, Selangor. Pemohon dalam kedua-dua permohonan semakan kehakiman telah menyaman sebagai Jawatankuasa Kuil Sri Subramaniya Swami Kajang, Jalan Reko Kajang ('jawatankuasa tersebut'). Jawatankuasa tersebut mengurus sebuah kuil yang dikenali sebagai Kuil Sri Subramaniya Swami, Kajang, Jalan Reko, 43000 Kajang, Selangor ('kuil tersebut') yang dibina di atas sebahagian Lot 4539 dan mengekalkan kubur Hindu dan krematorium di sebahagian tanah tersebut. Kedua-dua semakan kehakiman tersebut adalah berkaitan dengan dua perkara iaitu: (a) pengisytiharan penggunaan Lot 4539 pada mulanya sebagai rizab bagi tujuan tempat pengasingan dan pembakaran mayat jawatankuasa Hindu Kajang yang telah dipinda oleh kerajaan berkuasa untuk tempat untuk pengasingan orang bukan Islam dan kemudian dipindahkan lagi ke perkuburan jawatankuasa Hindu; dan (b) permohonan jawatankuasa untuk lanjutan kebenaran merancang untuk pembangunan Lot 4539 yang ditolak oleh Majlis Perbandaran Kajang ('MPKj'). Dua orang telah dinamakan sebagai pemegang amanah bagi pihak jawatankuasa Hindu Kajang yang dilantik untuk mengekalkan rizab di Lot 4539. Pemegang amanah telah meninggal beberapa tahun yang lalu dan pemohon tidak mempunyai maklumat lanjut mengenai mereka atau jika terdapat individu lain dilantik sebagai pengganti kepada pemegang amanah tersebut. Jawatankuasa tersebut mengambil alih pengurusan kuil yang terus digunakan sebagai perkuburan Hindu dan tempat pembakaran mayat. Tiada bukti menunjukkan bahawa jawatankuasa tersebut telah dilantik sebagai pengganti kepada pemegang amanah dengan kelulusan pihak berkuasa negeri. Dalam permohonan semakan kehakiman, pemohon berpendapat bahawa sebaik sahaja pemberitahuan *warta* itu dibuat menurut s 62 Kanun Tanah Negara ('Kanun tersebut'), ia tidak boleh dipinda kerana tidak ada kuasa di bawah KTN untuk meminda pemberitahuan tersebut. Pemohon juga berpendapat bahawa surat dari Timbalan Pengarah, Seksyen Pihak Berkuasa Tempatan, Unit Perancang Ekonomi, Pejabat Setiausaha Kerajaan Negeri terjumlah kepada kebenaran oleh Kerajaan Selangor sebagai kebenaran merancang. Peguam terpelajar bagi pihak MPKj berhujah bahawa permohonan semakan kehakiman ini tidak wajar dan penyalahgunaan proses mahkamah.

Diputuskan, menolak permohonan semakan kehakiman dengan kos:

(1) Perkataan 'boleh' dalam s 62(1) Kanun tersebut merujuk kepada kuasa budi bicara yang terletak pada pihak berkuasa negeri untuk menguatkuasakan rizab tanah negeri, sekiranya dilaksanakan hanya akan berkuat kuasa secara sah jika diberitahu dengan sewajarnya dalam warta kerajaan. Fakta yang nyata adalah bahawa tanah rizab adalah milik pihak berkuasa negeri yang merupakan kerajaan negeri Selangor. Lot 4539

walaupun diisytiharkan sebagai tanah rizab untuk tujuan awam iaitu pengasingan bukan Islam, kekal sebagai tanah negeri di bawah kawalan kerajaan negeri Selangor. Peranan jawatankuasa hanyalah untuk mengekalkan Lot 4359 untuk tujuan awam yang dimaksudkan. Peranan jawatankuasa adalah serupa dengan pemegang lesen atau pengguna sah tanah negeri (lihat perengan 24).

(2) Mahkamah berpuas hati bahawa terdapat bukti yang mencukupi yang menunjukkan bahawa pemberitahuan *warta* No 1511 mengandungi kesilapan apabila menyatakan tujuan awam mengenai rizab di Lot 4539 sebagai 'tempat untuk pengasingan bukan Islam' dan bukannya 'perkuburan Hindu' sepertimana yang telah diluluskan oleh Menteri Besar Selangor. Ia tidak boleh menjadi niat Parlimen untuk tidak membenarkan mana-mana ruang untuk membetulkan kesilapan dalam pemberitahuan *warta* tersebut. Sebarang kesilapan sah yang dibuat dalam pemberitahuan *warta* yang memberi kesan kepada rizab sedemikian hendaklah dibetulkan dengan pengeluaran pemberitahuan *warta* yang lain kerana ia adalah munasabah untuk membolehkan pihak berkuasa negeri menjalankan kuasa dengan berkesan (lihat perengan 25–26).

(3) Niat sebenar pihak berkuasa negeri dalam meluluskan rizab, seperti kelulusan MB Selangor dalam kes ini, adalah penting secara perundangan. Jelas sekali bahawa niat pihak berkuasa negeri dalam membuat Lot 4539 suatu rizab untuk tujuan awam adalah untuk menjadikannya sebagai 'tanah perkuburan Hindu' dan bukan 'tempat pengkebumian untuk orang bukan Islam'. Mahkamah mendapati bahawa responden telah bertindak dengan munasabah dan baik dalam kuasa mereka yang sah dalam membuat pembetulan (lihat perengan 27).

(4) Adalah sangat jelas bahawa menurut s 24(3), sebarang peluasan kebenaran merancang adalah berdasarkan budi bicara pihak berkuasa perancang tempatan. Pihak berkuasa perancang tempatan mungkin mengenakan syarat-syarat berkenaan dengan kebenaran merancang sebagaimana yang difikirkannya sesuai atau mengubah syarat-syarat yang mula-mula dikenakan. Ia tidak boleh dikatakan bahawa pemohon mempunyai jangkaan yang sah bahawa suatu permohonan untuk pelanjutan kebenaran perancangan akan diluluskan tanpa syarat, sebagaimana yang dihujahkan oleh pemohon. Lot 4539 adalah tanah rizab negeri dan kesemua hartanah di semua negeri hendaklah terletak pada pihak berkuasa negeri sahaja. Kuasa kerajaan negeri berkenaan dengan hartanah negeri adalah hanya oleh seorang pegawai kerajaan negeri yang diberikan kuasa untuk melaksanakannya melalui delegasi. Pada masa permohonan kebenaran merancang dibuat oleh jawatankuasa tersebut, ianya adalah Menteri Besar Selangor yang telah diberikan kuasa untuk memberikan persetujuan bertulis. Tidak ada bukti untuk

menunjukkan bahawa Menteri Besar Selangor atau Setiausaha Kerajaan Negeri, sebagai pegawai yang mempunyai kuasa, telah memberikan persetujuan bertulis kepada jawatankuasa untuk menjalankan projek tersebut di Lot 4539 dan memohon kebenaran merancang. Surat yang dikeluarkan adalah semata-mata untuk menyampaikan keputusan Jawatankuasa Hal Ehwal Luar Negeri Islam berkenaan dengan permohonan jawatankuasa untuk kebenaran merancang dan bukan untuk menyampaikan persetujuan pihak berkuasa negeri sebagai pemilik tanah (lihat perengan 33, 39 & 41).

(5) Ia adalah sebab yang sah untuk penolakan permohonan kebenaran merancang kerana bertentangan dengan tujuan umum tanah rizab itu. Walau apa pun, tiada apa-apa dalam Kanun Tanah Negara yang menghalang pihak berkuasa negeri daripada melihat semula keputusan awal mengenai perisytiharan tujuan umum rizab negeri dan membuat keputusan yang baru. MPKj telah menggunakan budi bicaranya dengan betul dalam membuat keputusan yang dipertikaikan tersebut. Apabila jawatankuasa membuat permohonan untuk kebenaran merancang, status rizab Lot 4539 tidak memberi sebarang kedudukan undang-undang kepada jawatankuasa untuk membuat permohonan itu, selain sebagai penghuni tanah (lihat perengan 43–44).

(6) Semakan kehakiman selalu mengikut budi bicara mahkamah, tetapi jika ada alternatif remedi yang lain, ianya hanya akan dilaksanakan dalam keadaan yang sangat luar biasa. Apabila terdapat remedi statutori alternatif yang ada, maka biasanya mahkamah akan menolak semakan kehakiman. Pengecualian terhadap pendekatan umum adalah apabila pemohon dapat menunjukkanlebihan atau penyalahgunaan kekuasaan atau melanggar peraturan keadilan semula jadi, di mana mahkamah akan bersedia untuk membenarkan semakan kehakiman. Mahkamah mendapati bahawa tidak ada keadaan yang luar biasa yang menunjukkan responden telah bertindak melebihi bidang kuasa atau menyalahgunakan kuasa mereka atau melanggar peraturan keadilan semulajadi dalam membuat keputusan terhadap perkara pokok semakan kehakiman. Responden tidak melakukan apa-apa penyalahgunaan atau keputusan yang tidak rasional dalam pengertian *Wednesbury* yang tidak munasabah. Responden telah menggunakan undang-undang dengan tepat terhadap fakta-fakta dalam membuat keputusan. Responden telah mempertimbangkan semua perkara yang berkaitan dengan isu ini dan tidak mengambil kira perkara yang tidak relevan. Keputusan tersebut tidak terjumlah kepada kelemahan yang menyalahi undang-undang, tidak rasional, tidak munasabah atau ketidakpatuhan prosedur (lihat perengan 48–49 & 53).]

Cases referred to

Associated Provincial Picture Houses, Ltd v Wednesbury Corp [1948] 1 KB 223, CA (refd)
Booi Kim Lee v Menteri Sumber Manusia & Anor [1999] 3 MLJ 515, HC (refd)
Council of Civil Service Unions and others v Minister for the Civil Service [1985] AC 374, HL (refd)
Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185, SC (refd)
Harianto Effendy bin Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor [2014] 6 MLJ 305; [2014] 8 CLJ 821, FC (refd)
Heavenly Heritage Sdn Bhd v Majlis Perbandaran Pulau Pinang [2016] 11 MLJ 383 (refd)
Koperasi Kijang Mas Bhd & yang lain lwn Kerajaan Negeri Perak & yang lain [1991] 1 CLJ Rep 650, HC (refd)
Lam Eng Rubber Factory (M) Sdn Bhd v Pengarah Alam Sekitar, Negeri Kedah dan Perlis & Anor [2005] 2 MLJ 493; [2005] 2 CLJ 157; [2005] 2 AMR 471, CA (refd)
M Sentivelu a/l R Marimuthu v Public Services Commission Malaysia [2005] 5 MLJ 393, CA (refd)
Majlis Perbandaran Pulau Pinang v Lembaga Rayuan Negeri Pulau Pinang & Anor [2006] 1 MLJ 352, CA (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
Majlis Perbandaran Subang Jaya v Visamaya Sdn Bhd & Anor [2015] 5 MLJ 554, CA (refd)
Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor [1998] 1 MLJ 305, CA (refd)
Minister of Labour v Lie Seng Fatt [1990] 2 MLJ 9, SC (refd)
North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun & satu lagi [2011] MLJU 1529; [2011] 4 CLJ 729, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan [1987] 2 MLJ 346; [1987] CLJ Rep 329, SC (refd)
Syed Mubarak bin Syed Ahmad v Majlis Peguam Malaysia [2000] 4 MLJ 167; [2000] 3 AMR 3048, CA (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 40(1)
Land Code 1926 s 24(i)
National Land Code ss 40(a), 42(1)(b), 62, 62(1), (2)
Street, Drainage and Building Act 1974 ss 70, 70A
Town and Country Planning Act 1976 ss 2, 18(1), 21(2), 22(2), (3), 23, 23(1), 24, 24(3), (5)

(Shui-Tai) for the applicant.

(Selangor State Advisor's Office) for the first, second and fourth respondent.
(Shahdan Anuar & Jamluadin) for the third respondent.

Vazeer Alam J:

[1] The underlying proceedings pertain to two inter-related judicial review applications concerning a graveyard/crematorium situated on Lot 4539, Mukim of Kajang, District of Ulu Langat, Selangor ('Lot 4539'), namely Judicial Review No BA-25–28–06 of 2017 ('JR1') and Judicial Review No BA-25–28–06 of 2017 ('JR2'). The applicant in both JR1 and JR2 is Kirubakaran a/l T Karthigesu, suing as the President and Public Officer of a registered society known as Jawatankuasa Kuil Sri Subramaniya Swami Kajang, Jalan Reko Kajang ('the society'). The society manages a temple known as Kuil Sri Subramaniya Swami, Kajang, Jalan Reko, 43000 Kajang, Selangor ('the temple') built on part of Lot 4539 and also maintains a Hindu graveyard and crematorium on parts of the said land.

[2] The respondents in JR1 are:

(a) the Selangor State Secretary ('SS') as the first respondent;

(b) the Selangor State Government ('SSG') as the second respondent;

(c) the Majlis Perbandaran Kajang ('MPKj') as the third respondent; and

(d) the Selangor Menteri Besar ('Selangor MB') as the fourth respondent.

[3] Whilst, the respondents in JR2 are:

(a) the Selangor State Secretary ('SS') as the first respondent;

(b) the Majlis Perbandaran Kajang ('MPKj') as the second respondent; and

(c) the Selangor State Government ('SSG') as the third respondent;

[4] Both JR1 and JR2 relates mainly to two matters:

(a) the first concerns the proclamation of the use of Lot 4539 originally as 'a reserve for the purpose of a place for the internment and cremation of the dead of the Hindu community of Kajang', which was amended by the state authority to 'for a place for the internment of non-Muslims' and then further amended to 'Hindu Cemetery'; and

(b) the second concerns the rejection of the society's application for extension of the planning permission or kebenaran merancang for the development of Lot 4539 by MPKj.

[5] By way of background, the following facts are relevant to the issues at

hand. A notification dated 15 February 1928 in respect of Lot 4539 was made in the FMS Government *Gazette* published on 2 March 1928 bearing *Gazette* Notification No 1183, and that reads:

> In exercise of the powers vested in him by section 24(i) of the 'Land Code, 1926', the Resident of Selangor hereby proclaims all the land comprised in lot No: 4539, in the mukim of Kajang, district of Ulu Langat, having a total area of 10 acres 16 poles, and delineated upon revenue survey plan No 12,951, deposited in the office if the Superintendent of Revenue Surveys, Selangor, to be a reserve for the purpose of a place for the internment and cremation of the dead of the Hindu community of Kajang, to be maintained by Muthupalanipillai son of Ramasamy Pillai and Thamboo son of Velupillai, and their successors duly appointed with the approval of the British Resident, as trustee on behalf of the Hindu community of Kajang.

[6] Hence, by that proclamation in the year 1928, Lot 4539 was *gazetted* as a reserve for public purpose, to wit, a place for the internment and cremation of the dead of the Hindu community in Kajang. Pursuant to s 24(i) of the Land Code 1926, two individuals, namely, Muthupalanipillai son of Ramasamy Pillai and Thamboo son of Velupillai, ('the trustees') were named as trustees on behalf of the Hindu community of Kajang, appointed to maintain the reserve in Lot 4539. The trustees had passed away some years ago and the applicant does not have any further information about them or if any other individuals were appointed as successors to the trustees.

[7] The society, upon its registration on 8 January 1969, took over the management the temple and Lot 4539, which continued to be used as a Hindu burial and cremation ground. The cremation of the dead at the material time was carried out by way of open burning using firewood. There is no evidence showing that the society was the duly appointed successors to the trustees, with the approval of the state authority as trustees, to maintain Lot 4539 as per *Gazette* Notification No 1183.

[8] The society, with the intention of regularising the legality of possession and control of Lot 4539, had by way of a letter dated 21 June 2014 applied to the Hulu Langat District Land Office to amend and/or revoke the proclamation of 15 February 1928 contained in *Gazette* Notification No 1183 and make a fresh *gazette* notification in respect of the reservation of Lot 4539 with a view to redeveloping Lot 4539. In para 7 of the said letter of 21 June 2014, the applicant on behalf of the society wrote:

> Maka dengan itu, kami dengan ini memohon kepada pihak Tuan untuk membuat satu perwartaaan semula terhadap Lot 4539 tersebut sepertimana berikut:
>
> Pada menjalankan kuasa yang diberikan oleh Seksyen 62 Kanun Tanah Negara 1965, notis adalah dengan ini diberi bahawa tanah yang dikenali sebagai Lot 4539, Mukim Kajang, Daearah Ulu Langat, Negeri Selangor dan sepertimana yang telah digariskan pada pelan hasil bernombor 12,951, yang disimpan di Pejabat Ukur

Tanah dan Pemetaan, Negeri Selangor, *hendaklah digunakan bagi tujuan tempat pengebumian bukan beragama Islam dan juga hendaklah diuruskan dan diselenggarakan oleh The Committee of Management of the Sri Subramaniya Swami Temple, Kajang* dan Lot 4539 hendaklah didaftarkan atas nama 3 orang pemegang amanah iaitu MARIE @ MARIMUTHU S/O SUPRAMANIAM (NRIC NO: 381010-10-5327), BALAKRISHNAN A/L SUBRAMANIAM (NRIC NO: 471115-10-5867) dan S VYTHILINGAM S/O A SANGARAPILLAI (NRIC NO: 350112-10-5131/3609114) dan mana-mana 3 pemegang amanah pada satu-satu masa yang diganti (sekirannya perlu) oleh The Committee of Management of the Sri Subramaniya Swami Temple, Kajang dari masa ke semasa bagi menggantikan pemegang amanah yang terdahulu menurut Undang-undang dan Perlembagaan The Committee of Management of the Sri Subramaniya Swami Temple, Kajang serta pindaannya.

[9] The society's aforesaid application was allowed in part by the SSG and the decision of the SSG is contained in the Government of Selangor *Gazette* dated 26 March 2015 bearing *Gazette* Notification No 1151. The said *gazette* notification was made under the hand of the Selangor MB and reads as follows:

[Subsection 62(1)]

RESERVATION OF STATE LAND FOR PUBLIC PURPOSE

In exercise of the powers conferred by subsection 62(1) of the National Land Code [Act 56/1965], conferred upon the State Authority and delegated to the Menteri Besar of Selangor by Notification published in Sel PU 17/1984 on 7 June 1984, the Menteri Besar of Selangor *has reserved the land* described in the Schedule and delineated upon Certified Plan deposited in the office of the Director of Survey and Mapping of Selangor, *for public purpose, to wit, a site for a place for the internment of non-Muslims and has designated that the State Secretary of Selangor shall have control of the reserved land and that the reserved land shall be maintained by the Persatuan Kuil Sri Subramaniya Swamy*.

2. Gazette Notification No 1183 published on 2 March 1928 is revoked.

[10] Hence, the effect of the decision of the SSG contained in the *Gazette* Notification No 1151, is as follows:

(a) Lot 4539 remains state land;

(b) the SSG has reserved Lot 4539 for public purpose, to wit, a place for the internment of non-Muslims;

(c) the SS shall have control of the reserved land; and

(d) the society shall maintain the reserved land.

[11] The society, with the intention to upgrade and improve the graveyard/crematorium on Lot 4539 applied to MPKj for planning permission ('application for KM') under the Town and Country Planning Act 1976 ('the

TCPA'), to redevelop part of Lot 4539 into a burial ground cum crematorium and columbarium ('the project') comprising the following:

(a) columbarium of three storey four units occupying 0.329 acres or 3.26% of Lot 4539;

(b) prayer hall (No 1) occupying 0.095 acres or 0.94% of Lot 4539;

(c) prayer hall (No 2) occupying 0.171 acres or 1.69% of Lot 4539;

(d) enclosed modernised crematorium with two gas burners occupying 0095 acres or 0.94% of Lot 4539;

(e) open foyer occupying 0.017 acres or 0.17% of Lot 4539;

(f) office occupying 0.025 acres or 0.17% of Lot 4539;

(g) walkway/corridor/foyer occupying 0.060 acres or 0.59% of Lot 4539;

(h) green space/landscaping occupying 2.775 acres or 27.48% of Lot 4539;

(i) internal roads, occupying 0.845 acres or 8.37% of Lot 4539;

(j) TNB substation occupying 0.060 acres or 0.59% of Lot 4539; and

(k) future and existing burial ground for Hindu only occupying 5.513 acres or 54.58% of Lot 4539.

[12] The society's application for KM was supported by the Jawatankuasa Hal Ehwal Selain Islam ('JHESI'), an administrative body of SSG, and approved by MPKj, as evidenced by the issuance of the letter dated 18 February 2015 and subsequently the *kebenaran merancang* ('KM') dated 9 April 2015, which according to s 24 of the TCPA was valid for a year.

[13] Following the issuance of the KM, the society also submitted the infrastructure and building plans ('application for plans approval') to MPKj for approval sometime between September 2015 and February 2016 pursuant to ss 70 and 70A of the Street, Drainage and Building Act 1974 ('the SDBA').

[14] Prior to the expiry of the KM, the society had on or about 5 April 2016 submitted an application to MPKj ('KM EOT application') for an extension of the KM pursuant to s 24 of the TCPA.

[15] The society did not receive any feedback from MPKj in respect of both the KM EOT application and the application for the plans approval. Instead, the society was invited by JHESI to attend a meeting on 13 June 2016. At the said meeting, the society was informed by a representative from the Pejabat Tanah dan Daerah Ulu Langat that there was a mistake in the *Gazette* Notification No 1151 that needs to be corrected.

[16] The society was subsequently invited by MPKj to attend a meeting on 29 March 2017 and at that meeting the society was informed that:

(a) the JHESI had at a meeting on 30 August 2016 decided to revert the public purpose status of Lot 4539 from 'internment of non-Muslims' to 'Hindu Cemetery' as in the Gazette Notification No 1183;

(b) MPKj had received a letter from the SS directing MPKj to build a crematorium with two diesel burners at the ceiling cost of RM2m to be borne by the SSG and handed over to the society to manage and maintain at their cost ('the alternate crematorium'); and

(c) the society's KM EOT application and the application for the plans approval will be discussed at MPKj's OSC meeting and will accordingly be informed of its decision.

[17] The society then received a letter dated 13 April 2017 from the Pejabat Tanah Daerah Hulu Langat enclosing a Government of Selangor *Gazette* dated 16 March 2017 bearing a *Gazette* Notification No 1057 that read:

(Subsection 62(1))

RESERVATION OF STATE LAND FOR PUBLIC PURPOSE

CORRIGENDUM

In the Gazette Notification No 1151 published on 26 March 2015, substitute for the words 'for the internment of non-Muslims' with the words 'Hindu Cemetery'.

[18] Hence, with this correction, the *Gazette* Notification No 1151 would now read:

(Subsection 62(1))

RESERVATION OF STATE LAND FOR PUBLIC PURPOSE

In exercise of the powers conferred by subsection 62(1) of the National Land Code [Act 56/1965], conferred upon the State Authority and delegated to the Menteri Besar of Selangor by Notification published in Sel PU 17/1984 on 7 June 1984, the Menteri Besar of Selangor has reserved the land described in the Schedule and delineated upon Certified Plan deposited in the office of the Director of Survey and Mapping of Selangor, for public purpose, to wit, a site for a place Hindu Cemetery ~~for the internment of non-Muslims~~ and has designated that the State Secretary of Selangor shall have control of the reserved land and that the reserved land shall be maintained by the Persatuan Kuil Sri Subramaniya Swamy.

2. Gazette Notification No 1183 published on 2 March 1928 is revoked.

[19] MPKj subsequently convened another meeting on 18 May 2017 to discuss the alternate crematorium and at this meeting a third party contractor, Pollution Engineering (M) Sdn Bhd ('PESB'), was introduced to the attendees

and it was announced that PESB was appointed as contractor to build the alternate crematorium at the site of the existing open firewood crematorium to be handed to the society to maintain and manage at its own costs.

[20] The society then commenced JR1, seeking the following relief:

(a) an order of certiorari to:

(i) set aside the whole or part of the decision of the SS and SG directing MPKj to build a crematorium with two diesel fired chambers and to be handed to the society to maintain and manage at its own costs, which decision was communicated by the MPKj to the society at a meeting held at the MPKj's office on 29 March 2017;

(ii) set aside the whole or part of the SG's and the Selangor MB's decision to correct the Selangor State Gazette Notification No 1151 dated 26 March 2015 vide Selangor State Gazette Notification No 1057 dated 16 March 2017 notifying the corrigendum of the words 'for a place for the interment of Non-Muslims' with the words 'Hindu Cemetery';

(b) a declaration against the respondents that the society has the right to commence the project for Lot 4539 pursuant to the planning permission dated 9 April 2015 and approval of the planning permission by the SG on 30 January 2015;

(c) an order of mandamus directing the SG and the Selangor MB to take all necessary action to revert the permitted usage of Lot 4539 from 'Hindu Cemetery' to 'for a place for the internment of Non-Muslims' within 30 days from the date of the order of this court;

(d) an order of mandamus directing the MPKj to process and/or revert with the outcome of the application for plans approval;

(e) an order of mandamus directing the MPKj to process and/or approve the KM EOT application;

(f) an order that the implementation of the decision by the SS and SG and their directions to MPKj to build a crematorium with two diesel fired chambers on Lot 4539 and deliver the same to the society to maintain and manage the same be stayed pending the final hearing and adjudication of this application for judicial review; and

(g) an order for all works being carried out by the MPKj and its contractor on Lot 4539 be stayed pending the final hearing and adjudication of this application for judicial review.

[21] The society then received another invitation to attend a meeting held by JHESI on 3 July 2017, and at the meeting, the society was informed that the

A decision undertaken by the SG to effect the corrigendum to *Gazette* Notification No 1151 and build the alternate crematorium was final.

[22] Thereafter, the society received letters from the MPKj rejecting the KM EOT application and the application for plans approval ('the rejection decisions'). In doing so the MPKj proffered the following reasons:

B

1. Permohonan tidak mendapat kelulusan daripada Setiausaha Kerajaan Negeri Selangor yang merupakan badan pegawal bagi tapak tersebut. ('the secretarial issue')

2. Pembangunan bercanggah dengan warta perizaban tanah kerajaan bagi maksud awam baru. ('the usage issue').

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[23] Consequent to the rejection decisions, the society commenced JR2, seeking, inter alia, the following relief:

D

(a) a declaration that SG (as the owner) and SS (as the owner) and SS (as the person designated to have control) of Lot 4539 had by way of letter dated 18 February 2015 consented to the application for planning permission made by the society pursuant to s 21(2) of the Town and Country Planning Act 1976 ('the KM application');

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(b) a declaration that by reason of SG and SS having consented to the said application, the requirements of s 21(2) had been fulfilled;

(c) an order of certiorari to:

F

(i) to set aside the whole or part of the decision of MPKj on 23 May 2017 in rejecting the KM EOT application as stated in 'Maklum keputusan Mesyuarat Jawatankuasa Pusat Setempat Bil 10/2017 — 23 Mei 2017'o dated 26 May 2017;

G

(ii) to set aside the decision of the SS in not granting approval for the KM EOT as stated in 'Maklum keputusan Mesyuarat Jawatankuasa Pusat Setempat Bil 10/2017 — 23 Mei 2017' dated 26 May 2017;

(iii) to set aside Borang C(2) — 'Penolakan Kebenaran Merancang' dated 1 June 2017 by MPKj;

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(iv) to set aside the decision of MPKj rejecting the society's application for plans approval as stated in MPKj's letter dated 5 June 2016; and/or

I

(v) further and/or in the alternative, to set asdie MPKj's decision to reject the KM granted to the society;

(d) an order of mandamus directing the SS and MPKj to process and approve the society's KM EOT application and the application for plans approval within 30 days from the date of the order of this court.

[24] Having perused both JR1 and JR2 applications and further having read and heard submissions of counsel, I dismissed both JR1 and JR2 for the following reasons.

[25] Learned counsel for the applicant submits that the corrigendum to *Gazette* Notification No 1151 is unlawful and ultra vires, and that the *Gazette* Notification No 1057 ought to be revoked for the following reasons:

(a) that s 62 of the National Land Code ('the NLC') does not provide for any corrigendum;

(b) that no credible evidence was adduced to support the contention on the existence of the alleged mistake in *Gazette* Notification No 1151;

(c) that there is insufficient material before the court to enable it to make a determination on the reasonableness of the decision and whether there is indeed a mistake in the *Gazette* Notification No 1151;

(d) that there was a breach of procedural unfairness and natural justice when the respondents had failed to accord the society a right to be heard because the corrigendum once carried out would have a direct impact on and will adversely affect the society; and

(e) that it is highly improbable that all parties involved in the publication of *Gazette* Notification No 1151 had made the same mistake especially when the *Gazette* Notification No 1151 was published consistent with the society's application to re-*gazette* the public purpose of Lot 4539.

[26] Now, Lot 4539 is state land. A good starting point would be to look at the nature of the reservation of Lot 4539. Section 40(a) of the National Land Code provides that the entire property in all state land shall vest solely in the state authority. Under s 42(1)(b) of the NLC, the state authority shall have the power to reserve state land, and s 62(1) of the NLC empowers the state authority to reserve any state land for any public purpose. Section 62 of the NLC reads as follows:

> 62 Power of reservation of State land.
>
> (1) The State Authority may by notification in the Gazette reserve any State land for any public purpose.
>
> (2) Any notification gazetted under sub-section (1) shall —
>
> (a) describe the reserved land;
>
> (b) describe the purpose for which the land is reserved;
>
> (c) designate the public officer for the time being having the control of the reserved land;

A (d) be conclusive evidence that the land so described is reserved for a public purpose.

(3) Copies of any such notification shall be published in accordance with the provisions of section 433.

B (4) Without prejudice to the provisions of any other written law for the time being in force, reserved land shall not be —

(a) disposed of by the State Authority except to the extent permitted by, and in accordance with the provisions of, section 63 and Chapters 2, 3 and 4 of this Part, or

C

(b) used for any purpose other than that for which it is reserved except in pursuance of a disposition made by virtue of any of those provisions.

D The word 'may' in s 62(1) of the NLC refers to the discretionary power vested in the state authority to effect reservation of state land, which if so exercised is only legally effective if duly notified in the government *gazette* as required under the same s 62(1). In the present case, the *gazette* notification was done via *Gazette* Notification No 1151, wherein the the state authority in exercise of the E powers conferred by s 62(1) of the NLC reserved Lot 4539 for public purpose, to wit, a site for a place for the internment of non-Muslims, and the SS was given control of the said reserve land and the society was appointed to maintain it. The fact remains that reserve land belongs to the state authority, which in our case is the Selangor State Government. Hence, Lot 4539, though F proclaimed as reserve land for the public purpose of the internment of non-Muslims, remains state land under the control of the SS. The society's role is merely to maintain Lot 4539 for its intended public purpose. The role of the society is akin to a licensee or or lawful user of the state land.

G **[27]** The applicant argues that once the *gazette* notification is made pursuant to s 62(1) of the NLC, it cannot be amended as there is no power under the NLC to amend such notification. I am unable to accept that contention. The respondents, particularly, the SS, SSG and the Selangor MB, have in their affidavits filed herein stated that there was a mistake in the *Gazette* Notification H No 1151 in that the public purpose stated therein as 'a place for the internment of non-Muslims' was erroneously made as the approval granted by the Selangor MB, as the person to whom the requisite power had been delegated by the state authority, was for Lot 4539 to be used as a public 'Hindu Cemetery'. The Selangor MB had in fact approved Lot 4539 as a reserve for 'Hindu Cemetery', I which was consistent with the original public purpose in the 1928 *Gazette* Notification No 1183. A meeting was held on 13 June 2016 chaired by the State Executive Council Member, YB Dato Teng Chang Khim, and attended by representatives of the society, as well as representatives of nearby housing estates to discuss the issue of Lot 4539 and its proposed redevelopment, and the

following appears in the minutes of meeting captioned as 'Keputusan Mesyuarat':

> 2. Wakil Pejabat Tanah dan Daerah memaklumkan kelulusan Menteri Besar pada awalnya adalah sebagai tapak perkuburan Hindu dan terdapat kesilapan di dalam pewartaan dimana ianya diwartakan untuk perkuburan selain Islam. Pejabat Tanah dan Daerah Hulu Langat akan membuat pembetulan terhadap kesilapan pewartaan tersebut.

The respondents have also exhibited the approval papers of the Selangor MB leading to the declaration of Lot 4539 as a reserve for public purpose, which clearly shows that the stated public purpose as approved by the Selangor MB was 'Keagamaan Bukan Islam — Perkuburan Hindu'. Thus, I am satisfied that there is sufficient evidence showing that the *Gazette* Notification No 1151 contained a mistake when it stated the public purpose of the reserve on Lot 4539 as 'a place for the internment of non-Muslims' ('tapak untuk tujuan tempat untuk pengebumian bukan beragama Islam') instead of 'Hindu Cemetery' ('Perkuburan Hindu') as was approved by the Selangor MB on 5 December 2014.

[28] The question then is; can such an error be corrected by the corrigendum that appeared in *Gazette* Notification No 1057, or is it beyond correction. The learned counsel for the applicant submits that such an error cannot be corrected as s 62 of the NLC does not provide for the same. I find that it cannot be the intention of parliament to not allow any room to correct an error in the gazette notification. I find that the SSG and the Selangor MB can correct the error in the gazette notification when s 62(1) of the NLC is read together with s 40(1) of the Interpretation Acts 1948 and 1967 that reads:

> (1) Where a written law confers a power on any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are *reasonably necessary*to enable the person to do or enforce the doing of the act or thing.

Hence, in giving effect to the powers conferred by s 62(1) of the NLC to the state authority to reserve any state land for public purpose, any genuine errors made in the *gazette* notification that gives effect to such reservation must be correctable by the issuance of another *gazette* notification, as this would be reasonably necessary to enable the state authority to exercise the power effectively as is provided in s 40(1) of the Interpretation Act 1948 and 1967.

[29] Further, whilst the *gazette* notification under s 62(1) and (2) of the NLC is statutorily prescribed and necessary, the actual intention of the state authority as can be gleaned from the official papers of the state authority in approving the reserve, such as the Selangor MB's approval in this case, is equally

important. In fact, Abdul Malek Ahmad J (as he then was) in *Koperasi Kijang Mas Bhd & yang lain lwn Kerajaan Negeri Perak & yang lain* [1991] 1 CLJ Rep 650 recognised this importance and said that:

> Sungguhpun s 62(1)(d) Kanun Tanah Negara 1965 menyatakan bahawa jika pewartaan dibuat ianya hendaklah diterima sebagai keterangan muktamad tentang maksud perizaban, ini tidak bermakna bahawa tanpa pewartaan itu mahkamah tidak boleh menerima kelulusan Majlis Mesyuarat Kerajaan Negeri sebagai keterangan yang tidak dipertikaikan tentang perizaban ini.

Hence, regard could also be had to the Selangor MB's approval papers to ascertain the true intention of the state authority in declaring Lot 4539 as a reserve for public purpose. And when regard is had to the approval papers of the Selangor MB, it is abundantly clear that the intention of the state authority in making Lot 4539 a reserve for public purpose was to make it available for a 'Hindu Cemetery' and not a 'place of internment for non-Muslims'. This was also consistent with the original reservation that was created in 2 March 1928 vide *Gazette* Notification No 1183, where the reservation was for the purpose of a place for the internment and cremation of the dead of the Hindu community of Kajang. In the circumstance I find that the respondents have acted reasonably and well within their lawful powers in making the corrigendum vide *Gazette* Notification No 1057.

[30] Now, as for the rejection decisions of MPKj, my findings are as follows. Learned counsel for the applicant submits that it was unlawful for MPKj to have rejected the KM EOT application and the application for plans approval, for the two reasons stated in the rejection letters, namely, the secretarial issue and the usage issue.

[31] In respect of the secretarial issue, the society's argument is that there is no statutory requirement under s 24 of the TCPA requiring the SS, as the person having control of Lot 4539, to make or support the KM EOT application. Likewise, learned counsel for the applicant also submits that the application for plans approval (made pursuant to ss 70 and 70A of the Street Drainage and Buildings Act 1974 ('the SDBA')) does not make it mandatory for the SS as the controller of Lot 4539 to make the application. The applicant further contends that at all material times the secretarial issue was never raised until the rejection decisions were made and as such it is a mere afterthought.

[32] MPKj refutes that allegation and states that on 12 September 2014 it had received the society's application for planning permission for Lot 4539 ie 'Kebenaran Merancang Bagi Cadangan Menaiktaraf Krematorium/Kubur/Rumah Letak Abu Mayat (Bukan Islam) Di Atas Lot 4539, Mukim Kajang, Daerah Hulu Langat, Selangor Darul Ehsan'. The application for planning permission was forwarded by the firm of AR

Rancangbina, the architects appointed by the society. MPKj states that at that point in time the society was not legally the body appointed to maintain Lot 4539, as the *Gazette* Notification No 1151 appointing the society as such was only gazetted on 26 March 2015. This fact was not made known to MPKj. Based on the information and material made available by the society, MPKj at its Mesyuarat Jawatankuasa Pusat Setempat ('OSC') had on 13 October 2014 approved the society's application for planning permission to redevelop with several conditions, one of which was:

> (a) Pembinaan Krematorium dan Kolumbarium hendaklah merujuk Jawatankuasa Rumah Ibadat Selain Islam Negeri Selangor terlebih dahulu sebelum surat kelulusan Kebenaran Merancang dikeluarkan.

[33] Subsequently, the Jawatankuasa Hal Ehwal Selain Islam Negeri Selangor at its meeting held on 30 January 2015 had discussed the society's aforesaid application for planning permission. This was confirmed in a letter dated 18 February 2015 from the Timbalan Pengarah, Seksyen Pihak Berkuasa Tempatan, Unit Perancang Ekonomi Negeri, Pejabat Setiausaha Kerajaan Negeri, the relevant parts of which reads:

> 2. Adalah dimaklumkan bahawa Mesyuarat Jawatankuasa Hal Ehwal Selain Islam Negeri Selangor Bil. 1/2015 yang diadakan pada 30 Januari 2015 telah membincangkan permohonan tersebut di atas.
>
> 3. Mesyuarat bersetuju untuk mempertimbangkan permohonan Kebenaran Merancang untuk Tetuan Kuil Subramaniya Swamy Kajang memandangkan semua jabatan teknikal tiada halangan terhadap permohonan tersebut. Sehubungan itu, pihak Tuan adalah dipohon untuk mengambil tindakan sewajarnya berkaitan permohonan ini.

[34] The society contends that the letter dated 18 February 2015 contains the approval of the Jawatankuasa Hal Ehwal Selain Islam Negeri Selangor, whilst MPKj argues that it is not an approval but merely conveys the meeting's willingness to consider the application. Nevertheless, MPKj granted the planning permission ('KM') via letter dated 9 April 2015. The KM was valid for a year and would have expired on or about 8 April 2016. When the KM was granted the *Gazette* Notification No 1151 had been published, ie on 26 March 2015, and the SS had been appointed as the person to have control of Lot 4539 and the society to maintain the reserved land for its public purpose.

[35] Before the expiry of the KM, the society's project consultant had on or about 5 April 2016 pursuant to s 24 of the TCPA submitted the KM EOT application to MPKj. Section 24 of the TCPA reads:

A (1) A planning permission granted under subsection 22(3) shall, unless extended, lapse twelve months after the date of the grant thereof if, within that time, the development had not commenced in the manner specified in the planning permission.

B (2) Subsection (1) shall not apply to a planning permission that expressly states that the development for which the planning permission is granted does not involve any building operation.

(3) On an application being made in that behalf in the prescribed manner before the planning permission lapses, the local planning authority may, on payment of the prescribed fee, grant an extension or further extension C of the planning permission.

(4) A planning permission extended under subsection (3) shall, unless further extended, lapse twelve months after the date of the extension thereof if within that time, the development had not commenced in the manner specified in the planning permission. D

(5) In granting an extension or further extension of a planning permission under subsection (3), the local planning authority may impose such conditions on the planning permission as it thinks fit or vary the conditions originally imposed; and section 23 shall apply with the E necessary modifications to the imposition or variation of conditions under this section as it applies to the imposition of conditions under subsection 22(3).

Hence, it is very clear that pursuant to s 24(3) any extension of a planning F permission is at the discretion of the local planning authority. Further, s 24(5) states that in granting an extension of a planning permission, the local planning authority may impose such conditions on the planning permission as it thinks fit or vary the conditions originally imposed. Hence, it cannot be said that an applicant has the legitimate expectation that an application for extension of a G planning permission would be unconditionally approved, as is contended by the applicant. Section 24(5) itself states MPKj may impose conditions when considering any application for extension of planning permission.

[36] MPKj states that the society's KM EOT application was brought to the H Mesyuarat Jawatankuasa Pusat Setempat (OSC) Bil 8/2016 on 18 April 2016 and the meeting resolved to postpone its decision for the reason that there were vehement protests and objections to the project by nearby residents and members of the public. In this regard MPKj had received letters of objection from the Persatuan Penduduk Tiara Residence dated 26 March 2016, I Persatuan Taman Jasmin dated 27 March 2016, and Persatuan Taman Jasmin II dated 31 March 2016. These protest letters were accompanied by signatures of protesting residents, as well as leaflets from a company known as Lotus Garden Memorial Park Sdn Bhd ('LGMP') which showed that the project was in fact a commercial joint venture involving LGMP and the society.

Some of the residents took objections to the society's use of the reservation land intended for public purpose for a commercial joint venture which would not be of interest to the Hindu community of Kajang.

[37] None of the respondents knew of the involvement of LGMP in the project and the society for the first time vide letter dated 22 April 2016 informed the Selangor MB of the involvement of LGMP. The said letter was forwarded by the Selangor MB to MPKj on 27 April 2016 for their further action. MPKj as the local authority had a public duty to consider all these fresh facts, which had come to its attention for the first time.

[38] Thereafter, a meeting was called on 13 June 2016 by the Seksyen Pihak Berkuasa Tempatan, UPEN, Pejabat Setiausaha Kerajaan Negeri, under the chairmanship of the Executive Councilor YB Dato' Teng Chang Kim, to discuss the objections raised by the residents and members of public against the project. The meeting resolved that:

(a) the reserve land shall be used only as a cemetery for the Hindu community in keeping with the original intent of the SSG when Lot 4539 was first *gazetted* in 1928 as reserved land for public purpose, ie a place for the internment and cremation of the dead of the Hindu community of Kajang;

(b) there was an error in the *Gazette* Notification No 1151, in that the public purpose was stated as 'a place for the internment of non-Muslims' ('tapak untuk tujuan tempat untuk pengebumian bukan beragama Islam') instead of 'Hindu Cemetery' ('Perkuburan Hindu'), and that the Hulu Langat Land Office shall take the appropriate measure to correct this error;

(c) the society had been appointed and *gazetted* merely as the body to maintain Lot 4539 as a reserve for public purpose, and hence all plans for developing the reserved land requires the consent of the SS as the person appointed and designated by the state authority to have control of the reserved land;

(d) the society had not informed the SSG or any of the respondents of its intended joint venture with LGMP to carry out the project prior to obtaining the KM. In this regard the meeting noted that the society's explanation that it did not have the necessary funds to undertake the project and that is why it had entered into the joint venture arrangement with LGMP to carry out the project on a commercial basis; and

(e) the society can apply for financial assistance from the SSG's Akaun Amanah Perkuburan through the appropriate Local Authority to carry out any redevelopment of the burial ground without having to carry it out with any joint venture partners, unapproved by the SSG.

[39] Subsequently, MPKj at its Mesyuarat Jawatankuasa Pusat Setempat (OSC) Bil 10/2017 held on 26 May 2017 resolved to reject the society's KM EOT application and conveyed that decision to the society vide letter dated 1 June 2017. MPKj had stated the following as the grounds for its rejection:

(1) Permohonan tidak mendapat kelulusan daripada Setiausaha Kerajaan Negeri Selangor yang merupakan badan pengawal bagi tapak tersebut.

(2) Pembangunan bercanggah dengan warta perizaban tanah kerajaan bagi maksud awam baru.

[40] The society had appealed that decision to the Selangor MB and a meeting was scheduled to be held on 3 July 2017 to be chaired by YB Dato' Teng Chang Kim to discuss the matter. However, the society had by then proceeded to file these judicial review applications and the meeting did not materialise.

[41] Now, Lot 4539 is reserved state land, and by virtue of s 40(a) of the NLC the entire property in all state land shall vest solely in the state authority. Hence, the owner of Lot 4539 is the SSG and the SS is the officer having control of Lot 4539 following the *Gazette* Notification No 1151 as amended by *Gazette* Notification 1054.

[42] According to s 21(2) of the TCPA, if the applicant for planning permission is not the owner of the land on which the proposed development is to be carried out then the written consent of the owner must be obtained and endorsed on the application. Section 21(2) of the TCPA reads:

> (2) If the applicant is not the owner of the land on which the development is to be carried out, the written consent of the owner thereof to the proposed development shall be obtained and endorsed on the application.

The applicant argues that the letter of 18 February 2015 from the Timbalan Pengarah, Seksyen Pihak Berkuasa Tempatan, Unit Perancang Ekonomi Negeri, Pejabat Setiausaha Kerajaan Negeri, (referred to earlier) amounts to consent from the SSG that fulfills the requirements of s 21(2) of the TCPA. The respondents argue otherwise. The respondents state that the applicant never obtained the written consent from the state authority for the proposed Project to be carried on within state reserve land and neither was such consent endorsed on the application for planning permission as required under s 21(2). Having considered the evidence, I find that the letter of 18 February 2015 cannot be construed as written consent of the state authority, as the land owner, for the proposed project. This is because the said letter is issued under the hand of Timbalan Pengarah, Seksyen Pihak Berkuasa Tempatan, Unit Perancang Ekonomi Negeri, Pejabat Setiausaha Kerajaan Negeri, and there is no evidence indicating that this officer has the delegated powers to issue such consent for

and on behalf of the SSG as owner of the land. When the Selangor MB approved the *gazetting* of Lot 4539 as reserve for public purpose on 5 December 2014, it was done by virtue of his delegated powers under the Ordinan Perwakilan Kuasa Sel PU 17 dated 7 June 1984, as is evident from the approval papers. Hence, the powers of the state government in respect of state lands must be dealt with only by an official of the state government having been given the powers to do so by delegation. Thus, at the time when the application for planning permission was made by the society, it was the Selangor MB who had the delegated authority to give the written consent as required under s 21(2) of the TCPA. There is no evidence to show that the Selangor MB or the SS, as the officer having control, had given their written consent for the society to carry out the project on Lot 4539 and to apply for the KM.

[43] In this context, it is very clear that the letter dated 18 February 2015 was issued merely to convey the decision of the Jawatankuasa Hal Ehwal Selain Islam Negeri in respect of the society's application for planning permission and not to convey the state authority's consent as the land owner. In this regard, it may be worth noting that the society never informed the SSG that the project was a commercial joint venture with a private entity, LGMP, to develop state reserve land. In such circumstance, it cannot be said that SSG had given its consent to develop Lot 4539 as per the proposal contained in the planning permission. How could the SSG be said to have given its consent as land owner to develop Lot 4539 on a commercial joint venture basis when a basic and important fact such as the commercial joint venture that carries vast legal implication had not been divulged to the SSG.

[44] When the KM EOT application was made, the *Gazette* Notification No 1151 had been published, and by virtue thereof, the SS had been appointed as the officer having control of Lot 4539. Hence, by virtue of this change in circumstance, I find that it was well within the powers of MPKj to require that the society obtain the written consent of the SS to the KM EOT application, after all MPKj can impose any additional condition as it thinks fit when considering an extension to planning permission as provided in s 24(5) of the TCPA that reads:

> In granting an extension or further extension of a planning permission under subsection (3), the local planning authority may impose such conditions on the planning permission as it thinks fit or vary the conditions originally imposed; and section 23 shall apply with the necessary modifications to the imposition or variation of conditions under this section as it applies to the imposition of conditions under subsection 22(3).

Thus, MPKj was entirely correct in law to require that there be fulfillment of s 21(2) of the TCPA before it considers whether to grant an extension of the KM. Therefore, when the society failed to obtain the written consent of the SS

as the officer having control of Lot 4539, MPKj had rejected the KM EOT application, and this is one of the two reasons given for the rejection. This, I find is perfectly in order.

[45] The other reason given for the rejection is that the application for planning permission is contrary to the public purpose of the reserved land, as corrected by the *Gazette* Notification No 1054, ie for Hindu Cemetery. This is also a valid reason for the rejection as I had found earlier that the corrigendum correcting *Gazette* Notification No 1151 was proper and validly done. In any event, there is nothing in the NLC that precludes the state authority from revisiting an earlier decision as regards the declaration of public purpose of state reserve and making a fresh decision. This was confirmed by the Federal Court in *North East Plantations Sdn Bhd lwn Pentadbir Tanah Daerah Dungun & satu lagi* [2011] MLJU 1529; [2011] 4 CLJ 729. This principle was also recognised and applied by the Planning Appeal Board (Penang) in *Heavenly Heritage Sdn Bhd v Majlis Perbandaran Pulau Pinang* [2016] 11 MLJ 383, where it was held:

> The development-history of a piece of land is a relevant and material factor, which cannot be ignored when a local planning authority considers a planning application affecting that land. While it does not mean that a local planning authority can never depart from its previous decision or policy if present circumstances so demand or allow; a departure should be done as an exception rather than the rule. Importantly, a departure should not be done by ignoring planning history; but rather, by providing sound reasons why it is the right thing to do in the circumstances, despite its development-history.

Further, under the Rancangan Tempatan Kajang, Majlis Perbandaran Kajang 2020 ('Kajang Local Plan') that was *gazetted* on 20 January 2011, Lot 4539 has been zoned for use as 'Perkuburan Hindu'. In considering any application for planning permission, the intended development must match the zoning category of the land under the TCPA with the land usage under the NLC. Hence, in the present case any planning permission for Lot 4539 must be for the purpose of 'Perkuburan Hindu'. This principle was confirmed by the Court of Appeal in *Majlis Perbandaran Subang Jaya v Visamaya Sdn Bhd & Anor* [2015] 5 MLJ 554 when it held:

> The TCPA provided specifically for the proper control and regulation of town and country planning in Peninsular Malaysia and for purposes connected therewith or ancillary thereto. While the NLC addresses land use in individual titles, the TCPA addresses planning by land use zones.
>
> ...
>
> The use allowed in the title under the NLC must be read so as to be consistent with the zoned use of the area the land is located in. A commercial building in a local area planned or zoned for industry must necessarily be a commercial building consistent

with serving industry. To accept otherwise would be to flout the TCPA and the Local Plan MPSJ 2020.

[46] This pronouncement of the Court of Appeal is consistent with the statutory provision in s 18(1) of the TCPA that reads:

(1) No person shall use or permit to be used any land or building otherwise than in conformity with the local plan.

And further s 22(2) of the TCPA provides that:

(2) In dealing with an application for planning permission, the local planning authority shall take into consideration such matters as are in its opinion expedient or necessary for proper planning and in particular —

(a) the provisions of the development plan, if any ...

The term 'development plan' is defined as 'local plan' in s 2 of the TCPA.

Hence, in considering the Kajang Local Plan, the use and planning history of the land from 1928 and the change of circumstance in terms of the existence of *Gazette* Notification No 1151 and 1054 and the nature of the reservation of Lot 4539, I find that MPKj had properly exercised its discretion in making the decisions challenged herein. In this regard, it must be noted that when the society made the application for planning permission on 12 September 2014, Lot 4539's reserve status was governed by the 1928 *Gazette* Notification No 1183, which did not give any legal standing to the society to make the application, other than as occupier of the land. The society's appointment as the body to maintain Lot 4539 as a reserve for public purpose of a Hindu Cemetery only came into being after the publication of *Gazette* Notification No 1151 on 26 March 2015 and the revocation of *Gazette* Notification No 1183 of 1928.

[47] The respondents have also raised the issue of the availability of an alternative remedy in the form of a statutory appeal process in s 23 of the TCPA, where an applicant for planning permission who is aggrieved by the decision of the local authority may lodge an appeal to the appeal board. The learned counsel for the respondents have referred to the decision of the Supreme Court in *Semantan Estate (1952) Sdn Bhd v Collector of Land Revenue Wilayah Persekutuan* [1987] 2 MLJ 346; [1987] CLJ Rep 329 and argues that the law is settled in that orders of declaration or mandamus will not be issued where there is an alternative remedy available. Section 23(1) of the TCPA provides:

23 Appeal against decision of local planning authority

A (1) An appeal against the decision of the local planning authority made under subsection 22(3) may be made to the Appeal Board within one month from the date of the communication of such decision to him, by —

(a) an applicant for planning permission aggrieved by the decision of the local planning authority to refuse planning permission or by any condition imposed by the local planning authority in granting planning permission; and

B

(b) a person who has lodged an objection pursuant to subsection 21(6) and is aggrieved by the decision of the local planning authority in relation to his objection.

C

[48] The decision of the MPKj in not granting the KM EOT application, which tantamount to the rejection of planning permission, is a decision within s 22(3) of the TCPA that reads:

D (3) After taking into consideration the matters specified in subsection (2), the local planning authority may, subject to subsection (4), grant planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuse to grant planning permission.

E After all, in s 24 of the TCPA that deals with an application for extension of planning permission, there is cross reference to both ss 22(3) and 23 of the same Act.

F **[49]** Hence, learned counsel for MPKj submits that the both these applications for judicial review are improper and an abuse of court's process and the applicant had a suitable alternative statutory remedy available under s 23(1) of the TCPA.

G **[50]** However, learned counsel for the applicant contends that the mere availability of the alternative remedy will not bar an application for judicial review. I agree with learned counsel for the applicant judicial review is always at the discretion of the court, but where there is alternative remedy available, it would be exercised only in very exceptional circumstances. The following high authorities are on point:

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(a) *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185, where the then Supreme Court held that:

> A clear principle is reiterated here ie it is not a rigid rule that whenever there is an appeal procedure available he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances. ... In answer to the first question we would therefore hold that the discretion is still with the courts but where there is an appeal provision available to the applicant certiorari should not normally

I

issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

(b) *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1, the Federal Court held as follows:

> ... we recognise that there are certain classes of cases such as planning, employment cases and tax cases ... where a statute provides for a specialised appeal procedure, and so the courts understandably may not grant judicial review but this is always subject to the grant of review in certain cases, for example, where an applicant is able to demonstrate excess or abuse of power, or breach of the rules of natural justice.

[51] The principle to be distilled from these high authorities is that when there is an alternate statutory remedy available, then ordinarily the courts would decline judicial review. The exception to that general approach is when the applicant is able to show clear excess or abuse of power or breach of the rules of natural justice, in which case the courts would be ready to grant judicial review. Now, applying that principle to the facts of the present case, I find that there are no exceptional circumstances showing the respondents to have acted in excess of jurisdiction or of having abused their power or having breached the rules of natural justice in coming to the decisions which are the subject matter of these judicial review. And as was pointed out by the Court of Appeal in *Majlis Perbandaran Pulau Pinang v Lembaga Rayuan Negeri Pulau Pinang & Anor* [2006] 1 MLJ 352:

> ... the right of appeal is not a common law right either as a matter of private or public law. It is a creature of statute. If it is not given then it does not exist. And once given, it is a substantive and not a mere procedural right.

In the circumstance, I find that the applicant ought to have availed themselves of this substantive statutory right and lodged an appeal in accordance with s 23(1) of the TCPA against the MPKj's decision to reject the KM EOT application and not file these applications for judicial review, for such an application, when no exception circumstance is shown, would amount to an abuse of process.

[52] It is well settled that the High Court when hearing an application for judicial does not sit in its appellate jurisdiction but merely performs its supervisory jurisdiction. See *Michael Lee Fook Wah v Minister of Human Resources Malaysia & Anor* [1998] 1 MLJ 305 (CA); *Minister of Labour v Lie Seng Fatt* [1990] 2 MLJ 9 (SC). Judicial review is not to interfere but to intervene where there is illegality, procedural impropriety or irrationality and possibly proportionality.

[53] Further, in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (FC); and *Booi Kim Lee v Menteri Sumber Manusia & Anor* [1999] 3 MLJ 515 (HC), the courts adopted the dicta of Lord Diplock in *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 and stated that the courts can, by way of judicial review, interfere with an act of an executive authority in generally three different circumstances, namely:

(a) illegality — that is when the authority concerned has been guilty of an error of law in its action, ie purporting to exercise a power it does not have and/or acting ultra vires its powers. This allows the courts to scrutinise such decisions not only for process, but also for substance (see *Syed Mubarak bin Syed Ahmad v Majlis Peguam Malaysia* [2000] 4 MLJ 167; [2000] 3 AMR 3048; *Lam Eng Rubber Factory (M) Sdn Bhd v Pengarah Alam Sekitar, Negeri Kedah dan Perlis & Anor* [2005] 2 MLJ 493; [2005] 2 CLJ 157; [2005] 2 AMR 471;

(b) irrationality — that is the when the authority exercises its power in such an unreasonable manner that the decision is so outrageous that it defies logic and that a person having put his mind to the question could not have arrived at such a decision, ie the *Wednesbury* unreasonableness principle — see *Associated Provincial Picture Houses, Ltd v Wednesbury Corp* [1948] 1 KB 223; and

(c) procedural impropriety — that is the authority's failure to observe procedural rules expressly laid down in the legislative instrument by which its jurisdiction is conferred, the breach of which may or may not involve denial of natural justice. See *M Sentivelu a/l R Marimuthu v Public Services Commission Malaysia* [2005] 5 MLJ 393.

[54] Lord Diplock mentioned 'proportionality' as a possible fourth ground of review and the Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (FC) said that such a principle is recognised as a general principle of English law, and when applied, it enables the court to review an impugned decision for substance as well as process. Indeed, in industrial and employment law the principle of proportionality is well recognised and has been a ground for judicial review (see *Harianto Effendy bin Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor* [2014] 6 MLJ 305; [2014] 8 CLJ 821 (FC)).

[55] I find that in the present application, the respondents have not committed any illegality, nor are the decisions irrational in the sense of the *Wednesbury* unreasonableness. In fact, I find that the respondents have quite correctly applied the law to the facts in making the impugned decisions.

[56] Thus, having considered the judicial review application, the affidavits,

and further having read and heard the submissions of counsel, I am unable to agree with learned counsel for the applicant that the respondents have committed errors of law that warrants curial intervention. I find that the respondents have considered all matters relevant to the issue and have not taken into consideration irrelevant matters. The decisions do not suffer from the infirmities of illegality, irrationality, unreasonableness or procedural impropriety. In the premise of the foregoing both the judicial review applications were dismissed with cost.

Judicial review applications dismissed with costs.

Reported by Mohd Kamarul Anwar